

***United States Court of Appeals
for the Second Circuit***



APPENDIX

W47
77-6121

IN THE COURT OF APPEALS OF
THE UNITED STATES FOR THE
SECOND CIRCUIT

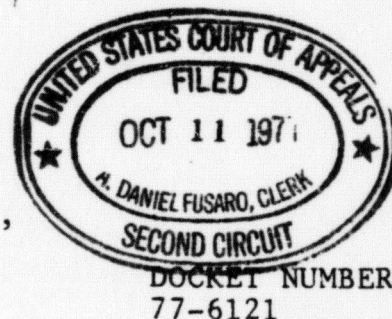
JOSEPH MARSHALL,

Plaintiff - Appellant,

vs.

UNITED STATES POSTAL SERVICE,

Defendant - Appelle.



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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

-----X

JOINT APPENDIX

X-----X

ROBERT DAVID BECKER, P.C.
Attorney for
Counsel for Plaintiff-Appellant

DAVID TRAGER, ESQ.
Counsel for
Defendant-Appellant
225 Cadman Plaza
Brooklyn, N.Y.

Office & P.O. Address
150 East 58th Street
New York, N.Y. 10022

Telephone: (212) 486-0535

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ROBERT DAVID BECKER

ATTORNEY AT LAW

150 EAST 58TH STREET

NEW YORK, N.Y. 10022

MARSHALL VS. U.S. POSTAL SERVICE

PROCEEDINGS

DATE	NR.	DESCRIPTION	NR.
7/75		Complaint filed. Summons issued.	(1)
-13-75		Summons returned & filed/Executed.	(2)
75		Copy of letter dated 6/26/75 filed from R. Becker to J. Neaher.	(3)
-75		By NEAHER, J-Stipulation dtd 7-2-75 extending time of deft to answer to 7-30-75, and that plttf may amend his complaint up to and including 7-30-75 filed.	(4)
-75		Stipulation extending time of deft to answer amended complaint 60 days from day of service filed.	(5)
9/75		By NEAHERJ.- Order dated 9/30/75 filed that the time for the deft to answer the complaint is extended to Oct. 30, 1975, etc.	(6)
-7-75		By NEAHER, J.-Stip. dtd 11-6-75 that the US Postal Service shall have until 11-30-75 to answer the complaint, and the plttf may amend his complaint up to and including 11-30-75. (mg)	(7)
13-75		First amended complaint filed. Amended summons issued. Jury trial demanded. (mg)	(8)
15/75		First Amended Summons read and filed. Executed.	(9)
-14-76		ANSWER filed.	(10)
9-76		Before NEAHER, J. - Case called. Conference held. Adj. w/o date.	(11)
-15-76		Notice of motion ret. 11-29-76 for summary judgment filed.	(12/13)
10-76		Notice of motion ret. 12-17-76 for an order granting summary judgment in favor of deft filed and memo of law in support filed.	(14)
13-76		Affidavit of mailing filed. (Motion & Memo of Law)	(15)
17-76		Points for oral argument filed.	(16)
77		By NEAHER, J Memo and order dtd 7-5-77 granting deft's motion for summary judgment. Clerk to enter judgment. mg Copies mailed.	(17)
8-77		JUDGMENT OF DISMISSAL dtd 7-8-77 filed(p/c mailed to attys). mm	(18)
-77		Notice of appeal filed. Duplicate of appeal & duplicate of docket entries to C of A. mm	(19)
8/77		By Neaher, J-Order dtd 8/1/77 filed re that the plttf-appellant be entitled XXXXXXXXXX to continue said proceeding to conclusion w/o prepayment of fees or costs or security filed.jlj	

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- -x

JOSEPH MARSHALL, :

Plaintiff, :

75 C 690

-against- :

UNITED STATES POSTAL SERVICE, :

Defendant. :

MEMORANDUM
AND
ORDER

----- -x

APPEARANCES:

ROBERT D. BECKER, ESQ.
Attorney for Plaintiff

DAVID G. TRAGER, ESQ.
United States Attorney,
Eastern District of New York
Attorney for Defendant
By LEWIS F. TESSER, ESQ.
Assistant U. S. Attorney

NEAHER, District Judge.

Plaintiff seeks review of a determination by the United States Civil Service Commission ("Commission") that it lacked power to review his separation from the United States Postal Service ("Postal Service") because he had voluntarily resigned his position as a letter carrier.

Plaintiff claims he is entitled to appeal the validity of the resignation to the Commission because it was obtained through duress, time pressure, intimidation and deception. He seeks reinstatement and back pay.

I.

Plaintiff had been employed by the Postal Service for eight years when he was apprehended by postal inspectors on July 17, 1972 and charged with mail theft. His arrest was based on information gained from an occupant of a house in which a raid had recovered stolen welfare checks. Immediately before his arraignment on the charges he signed a statement of resignation from the Postal Service. On January 4, 1974 the indictment against plaintiff was dismissed, and six days later plaintiff requested reinstatement and back pay from the Postal Service. When he did not obtain the requested relief he appealed to the Commission under 5 U.S.C. §7701. After a hearing an appeals officer denied the appeal because plaintiff's resignation was voluntary and thus beyond the Commission's appellate jurisdiction. After the Appeals Review Board affirmed that decision, plaintiff brought this action.

At the hearing before the appeals officer, plaintiff presented the following version of the facts. After his arrest, three postal inspectors took him by car to a street corner where they interrogated him for an hour. During that time he was not advised of his rights and was told that "it would be better" if he were to resign. Then he was taken to the postal inspectors' office in downtown Brooklyn, where he proclaimed his innocence,¹ composed a written statement of his activities that day, and telephoned an attorney, Perry Fish. After an inspector again suggested that he resign, he was taken to the basement of the federal courthouse. There he spoke for 15-20 minutes with Fish before he was taken upstairs for arraignment before a federal judge.

Prior to the arrival of the judge, plaintiff overheard a conversation in which the postal inspectors told Fish that plaintiff would benefit from resigning. Based on the information from the inspectors, Fish advised plaintiff to resign. As plaintiff testified at the hearing:

"It was described this way, that I would get off, I would come out better by resigning, and would be able to have my retirement pay and what have you: it would be easier on me if I resign, more

or less. That it may drop the case completely, if I resign and so forth." Transcript at 42.

Although he pleaded not guilty to the charges, he agreed to resign. The inspector dictated the following statement, which plaintiff wrote and signed: "I, Joseph Marshall, No. 264-40-0996, do hereby resign my job at the U.S. Postal Service for personal reasons."

Approximately three weeks later he received a Postal Service form which stated that he had resigned voluntarily for personal reasons. At one point he made an unsuccessful attempt to reach his union representative by telephone, but he never contacted the union or the Postal Service about the form he had received.

Fish corroborated much of plaintiff's story. He spoke with plaintiff for about 30 minutes in the Marshal's detention cell before plaintiff went upstairs to plead not guilty before the Magistrate. Then Louis Duquette, a postal inspector, told Fish that plaintiff should resign because otherwise he would be fired immediately, lose his accrued benefits, and not be rehired even if he were eventually acquitted. Unfamiliar with the workings of Civil Service,

Fish accepted this information and thereupon advised plaintiff that

"it would be in his interest at this point to resign and protect whatever rights might be accruing to him and should — in the event that he were to be acquitted of the charge, at that point, he would then fight the issue of the resignation or the firing, as being coercive." Transcript at 46.

Inspector Duquette's testimony conflicted with several of these allegations. He stated that plaintiff was given his rights verbally and that later he signed a written waiver of his rights. He did not discuss resignation with plaintiff while in the car after the arrest, but in the inspectors' office he might have informed plaintiff that he had the choice of resigning or facing charges from the Postmaster. He might have given a similar explanation at the time of plaintiff's resignation. He testified that "when an employee is arrested for the theft of mail, an attempt to get him out of the postal service is made, either by charges or resignation." Transcript at 78. He might have told plaintiff that he was "best off in resigning," but he never told an employee that he would lose any rights if he were fired. He admitted at the hearing that there was no advantage to resigning.

II.

The jurisdictional basis for this action is not readily apparent. District courts have jurisdiction over actions against the Postal Service under 39 U.S.C. §409(a). See Abbruzzese v. Barzak, 412 F. Supp. 201, 203 (D.N.J. 1976). Essentially, however, this action seeks review of the decision by the Civil Service Commission. The three members of the Commission's Appeals Review Board are joined as defendants. The recently-amended 28 U.S.C. §1331(a) grants the court jurisdiction over such an action. See Califano v. Sanders, 97 S.Ct. 980, 984-85 (1977).

In cases involving dismissals and other disciplinary actions against government employees, the Court of Appeals for this Circuit has limited the scope of judicial review to ensuring compliance with statutory procedures and guarding against "arbitrary or capricious" action. McTiernan v. Gronouski, 337 F.2d 31, 34 (2 Cir. 1964); United States v. Professional Air Traffic Controllers Organization, 438 F.2d 79, 80-81 (2 Cir. 1970). Other circuits, after considering the various review standards set forth in the Administrative Procedure Act, 5 U.S.C. §706, also apply the "arbitrary or

capricious" test to such cases. Wood v. United States Postal Department, 472 F.2d 96, 99 n. 3 (7 Cir. 1973); Twiggs v. United States Small Business Administration, 541 F.2d 150, 152-53 (3 Cir. 1976). Therefore, the court must determine whether there is a "rational basis" in the evidence for the Commission's determination that plaintiff resigned voluntarily. See Wood v. United States Postal Department, supra, at 99.

The evidence presented at plaintiff's administrative hearing clearly shows that plaintiff's resignation was not obtained through duress, time pressure, or intimidation. That he was faced with the unpleasant choice of resigning or being fired does not obviate the voluntariness of his resignation. Christie v. United States, 518 F.2d 584, 587-88 (Ct. Cl. 1975). He resigned on the advice of his attorney, and he did not attempt to withdraw his resignation until 18 months later, when the indictment against him was dismissed.

Plaintiff's remaining contention, that he was the victim of deception by the postal inspectors, finds some support in the record. According to Fish, plaintiff's attorney at the time of the resignation, Inspector Duquette

stated that, if plaintiff were fired, he would lose "all his accrued benefits, whatever they are." Transcript at 45. This would be erroneous information, for plaintiff was entitled to his "accrued benefits," namely, his retirement benefits, whether he resigned or was fired. Record, Part I, at 27. Plaintiff alleges he was told that he would "come out better by resigning, and would be able to have my retirement pay and what have you." Transcript at 42. Duquette, on the other hand, testified that he never told an employee that he would lose any rights if he were fired.

The appeals officer who presided over the hearing credited Duquette's testimony and found the testimony by plaintiff and Fish to be vague and open to question. It was the exclusive function of the appeals officer to assess the reliability of the witnesses. Coscia v. Willard, 257 F.2d 105, 107 (2 Cir. 1958). The court finds no reason, such as the use of improper or irrational criteria by the appeals officer, to disturb these determinations. See Breeden v. Weinberger, 493 F.2d 1002, 1010 (4 Cir. 1974).

Plaintiff also understood that "it would be easier on me if I resign, more or less. That it may drop the case

completely, if I resign and so forth." Transcript at 42. There is no deception indicated in these statements. The Commission found that plaintiff's resignation "was based on his desire to avoid facing charges stemming from his alleged criminal acts." Record, Part I, at 3. Plaintiff hoped to discourage criminal proceedings in addition to avoiding charges filed by the Postmaster and the consequent risk of being fired. A resignation based on such considerations is deemed voluntary. See Pitt v. United States, 420 F.2d 1028 (Ct. Cl. 1970).

Therefore, the Commission's determination that plaintiff's resignation was voluntary is not arbitrary or capricious because it has a rational basis in the evidence. Accordingly, defendants' motion for summary judgment is granted and plaintiff's motion for summary judgment is denied.

SO ORDERED.

The Clerk will enter judgment in favor of defendants dismissing the complaint upon the merits.

/s/ EDWARD R. NEAHER
U. S. D. J.

Dated: Brooklyn, New York
July 5, 1977

F O O T N O T E

- ¹ Contrary to that claim, the records of this court, 72 CR 914, disclose that on January 8, 1973 plaintiff in fact pled guilty to Count Three of the indictment, which charged him with conspiracy to unlawfully possess stolen Social Services checks. The plea was accepted by the late Judge Orrin G. Judd but judgment of conviction was never entered, presumably because his resignation was regarded as sufficient punishment.

Rec'd 8/31/73

IMPLEMENTATION OF MEMORANDUM OF UNDERSTANDING

In accordance with the Memorandum of Understanding pertaining to the Inspection Service which was reached during the 1973 National negotiations, the following statements of Postal Service policy shall be operative for all employees covered by the 1973 Agreement.

All Postal Service employees shall cooperate in any postal investigation (442.17 PSM). This includes investigations conducted by Postal Inspectors in connection with performance of their assigned duties and responsibilities. In criminal matters, of course, employees are entitled to exercise their constitutional right to remain silent by refusing to answer pertinent questions.

Postal Inspectors are not authorized to issue letters of charges to employees covered under the National Agreement. Furthermore, Inspectors are specifically prohibited from providing management with any recommendations or opinions as to the disciplinary action management should take. Inspectors are also strictly prohibited from soliciting or accepting resignations and are not authorized to counsel employees with regard to resignations, early retirement or disciplinary action which might be taken against the employee by management.

Although Postal Inspectors are not authorized to issue letters of charges or in any manner to mete out discipline to employees, it is recognized that in some instances an employee under criminal investigation might voluntarily resign or request early retirement. In such cases, Inspectors are directed to advise the employee to discuss such matters with the appropriate administrative official.

When an employee has been arrested for a violation of criminal law or the criminal investigation reaches the accusatory stage, i. e., the investigation has begun to focus on the employee as a particular suspect in the case, prior to any further interrogation, the employee must be informed of his constitutional right against self-incrimination and also must be assured a continuing opportunity to exercise these rights.

The Inspector must inform the employee that: (1) he has the right to remain silent; (2) anything he says can be used against him in court; (3) he has the right to talk to an attorney for advice before any questions are asked, and to have the attorney with him during questioning; (4) if he cannot afford an attorney, one will be appointed for him before any questioning if he wishes; and (5) if he decides to answer questions without an attorney present, he will still have a right to stop answering at any time. He also has the right to stop answering at any time until he talks to an attorney. The employee, however, if he does so voluntarily, knowingly, and intelligently, may waive these rights.

2

In addition to the employee's being informed of his aforementioned constitutional rights, to insure that the employee's employment rights vis-a-vis the U. S. Postal Service are not jeopardized, he is entitled to request the presence of a union representative in an interrogation by a Postal Inspector at this stage of the criminal investigation. (The right to union representation does not apply, of course, to investigations of non-criminal matters, including the questioning of employees by Inspectors during or in connection with postal operating inspections and internal audits.)



DIRECTOR, NEW YORK REGION
U. S. CIVIL SERVICE COMMISSION
FEDERAL BUILDING, 35 FEDERAL PLAZA
NEW YORK, N.Y. 10007

UNITED STATES CIVIL SERVICE COMMISSION

NEW YORK REGION

COMPRISING NEW YORK, NEW JERSEY,
PUERTO RICO AND THE VIRGIN ISLANDS
OFFICE OF THE DIRECTOR, NEW YORK, N.Y. 10007

IN REPLY, PLEASE REFER TO

NY:RJS:dd

YOUR REFERENCE

AUG 20 1973

Postmaster
U. S. Post Office
Fair Lawn, New Jersey 07410

Re: Part 752-B Appeal
Appellant: Louis J. Abbruzzese
Position: City Carrier
Agency and U. S. Post Office
Location: Fair Lawn, New Jersey

Dear Sir:

Reference is made to the case of Mr. Louis J. Abbruzzese, a former City Carrier full time, PFS Level 5, Step 12, \$11,075 at the Fair Lawn, New Jersey Post Office. Mr. Abbruzzese submitted a written appeal to this office on May 31, 1973, in which he contended, in effect, that his resignation from the position of City Carrier on May 9, 1973, had been secured by improper means and was involuntary on his part.

The Civil Service Commission generally has no basis for appellate review of separations resulting from employee resignations, which by their nature, are considered to be voluntary personnel actions. The Commission does review, on appeal, certain specific adverse personnel actions taken by employing agencies as defined under the terms of Part 752 of the Civil Service Regulations. A separation which results from an employee's resignation may be reviewed only when it is shown that the resignation was secured under such conditions of duress or deception as to indicate that the separation should be considered, in fact, an adverse action within the meaning of Part 752 of the Regulations, erroneously recorded as a resignation.

We have reviewed the contents of the appellant's initial letter of appeal, the information submitted by you to this office on June 13 and 18, 1973 and the verbatim transcript of the oral hearing conducted at the appellant's request at this office on July 13, 1973. The record discloses that on March 1, 1950 the appellant was appointed to the position of indefinite Substitute Mail Handler at the General Post Office in New York City, New York. He was appointed a permanent Substitute Mail Handler at the same office on August 17, 1952. On April 6, 1956 he resigned his position

at the General Post Office, New York City, New York to accept a career appointment at Fair Lawn, New Jersey. He was appointed to the position of Career Substitute Carrier at Fair Lawn, New Jersey on April 7, 1956. He was reassigned to the position of Regular Carrier at Fair Lawn on September 22, 1956. The record further contains a handwritten note dated May 9, 1973 addressed "To Postmaster, I hereby resign from the Fair Lawn Post Office as the above date due to personal reasons." Signed Louis J. Abbruzzese. This document further contains the statement "I accept this resignation for Postmaster, Fair Lawn, New Jersey 07410". Signed John Haftak, Superintendent of Mails. In accordance with the request, an official Notification of Personnel Action was issued on June 7, 1973 effecting the appellant's release from employment by resignation.

In his letter of appeal from the Commission dated May 31, 1973 the appellant indicates that on May 9, 1973 after leaving the Fair Lawn, New Jersey Post Office Building and proceeding towards his car, he was stopped by two men, one of whom identified himself as a Postal Inspector. This action occurred after the appellant had completed a tour of duty at approximately 3:15 P.M.

The appellant continues that he was requested to return to the Post Office, which he did, then was taken to the Postmaster's Office. There, the Inspectors proceeded to search his person. He recounts that the Postal Inspectors locked the door of the Postmaster's Office and requested that he empty his pockets as well as the contents of his wallet. They directed him to spread everything out on the desk.

He states that while he was doing this they informed him of his rights and advised him to ask any questions if he did not understand what they said or what the procedure was.

The letter continues that at the request of the Postal Inspectors the appellant removed his hat and two letters he had picked up at a mailbox were still in the hat. The appellant indicated he explained to the Inspectors that he had forgotten to remove them from his hat.

According to the appellant the Inspectors then showed him two additional letters which had been dispatched that day. The appellant states he remembered them both and told the Inspectors that they were forwards which he had properly forwarded to the next address. He was then advised by the Inspectors that \$15.00 was unaccounted for and he informed the Inspectors that he had no idea where the money was and knew nothing about it. The Inspectors then suggested that the appellant replace the money with his own money and the appellant refused to do this stating that

he did not take the money and could see no reason for replacing it.

The inspectors then removed the lock and key chain from the appellant and according to the appellant searched his locker and his Carrier desk drawer and found nothing. The appellant indicates that upon his return to the Postmaster's office he was in a state of confusion. He states the Postal Inspectors summoned the Superintendent of Mails, Mr. John Haftek and suggested that the appellant resign voluntarily in view of what had happened. The appellant wrote that Mr. Haftek had a pen and pad with him when he came into the Postmaster's office and that without thinking, he, the appellant, signed his name to the resignation and Mr. Haftek signed as a witness.

The appellant indicates that he was then taken to the Hackensack Court. The letter does not indicate whether or not the appellant was detained overnight, but does go on to say that on May 10, 1973 he was photographed and fingerprinted at the Post Office in Kearny, New Jersey. He indicates that he appeared before Judge Schweitzer at 1:00 P.M., but the exact date is not indicated.

The letter continued that on the way home from court, he began to think clearly for the first time in twenty-four hours and decided to retract the resignation. He states he went to Mr. Bartoli who said he would accept the request to withdraw the resignation but added that he would have to check with the Postal Inspectors. The next day, according to the appellant, Mr. Bartoli informed him that it was out of his hands and he could not reinstate the appellant.

The appellant concludes his letter by indicating that he was under severe mental and emotional strain when he resigned. He points out his twenty-three years of Postal service and and thirty-three months in the military. He states that in effect he was removed from the Postal Service rather than resigning voluntarily. He requests that he be given his rights as a veteran under Title 5 of the U.S. Code, Section 752, formerly known as the Veterans Preference Act.

On June 13, 1973, Mr. John Haftek, Superintendent of Mails at Fair Lawn, New Jersey submitted a written statement to this office concerning his part in the appellant's resignation. In the statement Mr. Haftek states that he and the appellant were alone in the Postmaster's office. He states that the appellant requested that he, Mr. Haftek, intercede and have the charges dropped by the Inspector. Mr. Haftek goes on to say that he replied to this request in the negative and stated that he informed the appellant that he was under arrest and that he, Mr. Haftek, could not intercede. When the employee then asked what he should do, Mr. Haftek states "I suggested he resign before being arraigned."

Mr. Haftek goes on to state "In the best interests of the employee, the suggestion that he resign was with the view for the protection of his postal benefits and future job recommendations." He concludes his statement by stating "Considering his length of service, the employee and his family, I suggest that he resign for the good of the employee's future."

Mr. Haftek's testimony in the course of the Commission hearing on July 13, 1973 elaborated substantially on this statement. In his testimony Mr. Haftek indicated that the appellant had been with the Inspector, in the Postmaster's office, for about one-half hour when the Inspector came out of the office and indicated to Mr. Haftek that the appellant had been very cooperative and wished to talk to Mr. Haftek. He stated he went into the Postmaster's office and suggested to the Inspector that he would like to speak to the appellant alone. He stated that the Inspector then left the Postmaster's office.

He then advised the appellant that he was in trouble, that he had no one to blame but himself. He stated the appellant acknowledged the fact that he could not blame anyone else for his difficulty but requested that he "get these guys off my back". Mr. Haftek indicated he then advised the appellant he was under arrest and that he, Mr. Haftek, could not intercede with the Inspectors.

He further testified that when the appellant asked him what he should do, he advised the appellant that this was his first experience in such an affair, but that he was under the impression that if the appellant resigned before he was arraigned he would protect his annuities and everything else.

Mr. Haftek further testified that when the appellant asked him what would happen if he did not resign, he advised him that he would probably be fired. According to Mr. Haftek, the appellant had indicated he thought it would be better if he did resign. The appellant then wrote out his resignation. Mr. Haftek further testified that he pads and pencils used to write the resignation were in the Postmaster's office, that he did not bring them into the office.

Under cross examination Mr. Haftek indicated that he suggested that the appellant resign so there would not be any stigma attached to him in applying for another job. He stated he did not know that the circumstances under which the appellant resigned would appear on the Form 50. Mr. Haftek stated he did not know that the appellant would not have access to the grievance arbitration procedure under the National Agreement if he resigned.

Mr. Haftek further testified that the date of the resignation was selected as May 9, because Mr. Abbruzzese was to be arraigned on May 9th and that it was agreed by Mr. Abbruzzese and himself that he should resign before the arraignment.

Mr. Abbruzzese's testimony concerning the facts and circumstances surrounding the resignation substantially comply with the testimony of Mr. Haftek. The most significant part of Mr. Abbruzzese's testimony to feel is contained on Page 39 of the Hearing Transcript. In answer to a question concerning his union benefits and the fact that in signing the resignation he was separating himself from the union protection, Mr. Abbruzzese replied "No, I didn't realize it at the time but my main thing then was losing my pension, the money I had paid in for twenty-three and a half years and my family of course, and these are the things that in the future if anything did happen, like if they would call the Post Office they would say, well, this man was fired, but if he resigned it would sound better, you know for future employment". Mr. Abbruzzese further testified that he asked Mr. Haftek about the future when they were discussing the resignation and according to Mr. Abbruzzese, Mr. Haftek informed him that in the future if anyone would call the Post Office the word "fired" or anything like that wouldn't be mentioned, that the inquiry would be answered by indicating that the appellant had resigned. Mr. Abbruzzese stated that Mr. Haftek indicated this would sound much better.

Mr. Haftek acknowledged that this was the gist of his conversation with Mr. Abbruzzese. That he had in fact advised him that if he resigned under the circumstances, future prospective employers would be advised only of the resignation, and not of the circumstances under which the resignation occurred.

There is no doubt in our mind but that Mr. Haftek sincerely sought to aid Mr. Abbruzzese with his advice. However, by Mr. Haftek's own testimony, this was his first experience in such matters and he really was not sure of the information upon which he based his advice. Much of the advice given to the appellant by Mr. Haftek was erroneous. While the testimony indicates that some of Mr. Haftek's recommendations were qualified with such words as "I think" and "I believe", there is one area in which both the appellant and Mr. Haftek agree there was no qualification. That is the area concerning the future employer inquiries to the Post Office.

Mr. Haftek was the Superintendent of Mails at the Fair Lawn, New Jersey Post Office. He was an individual upon whom the appellant could reasonably rely for accurate information. Mr. Haftek testified that he clearly indicated to the appellant that future inquiries by prospective employers would be answered only with the information that the appellant had resigned.

The appellant testified that he was sincerely concerned about his future. That he felt that it would be much more desirable in terms of his future employment opportunities, if only the resignation was recorded and not the facts surrounding the resignation. It is clear at least in part, that the appellant relied upon this information when submitting his resignation.

It is also quite clear that the information given to the appellant by Mr. Haftek was erroneous. The regulations clearly require that when an individual resigns while charges or an investigation is pending, the facts must be set forth in their entirety on the Form 50. The Form 50 executed to effect the appellant's resignation sets forth "Resigned for personal reasons while under investigation by Postal Inspectors for theft of mail" (Case No. 11-12396-SD-L).

The appellant, in relying upon erroneous information supplied to him by a person in authority, a person upon whom a reasonable man, in all of the circumstances, could rely, was no longer capable of a voluntary free-will act within the meaning and intent of the Commission's Regulations. No matter how well intentioned the actions of Mr. Haftek, the advice he gave was erroneous and when the appellant relied upon this advice to make a decision, it changed the nature and character of the appellant's action. For this reason we must find that the action of the appellant in resigning was not voluntary and was in fact an adverse action by the Department.

In view of our finding that the appellant's action in resigning was not a voluntary free will act, it is recommended that the resignation be rescinded and that the personnel action effecting the appellant's release from the service be cancelled and that the appellant be restored to the position of City Carrier, PFS Level 5, Step 12, \$11,073 per annum retroactively to the date of his release from the service. This letter constitutes your authority to take the recommended corrective action which should be accomplished in accordance with instructions contained in Federal Personnel Manual Supplement 296-31. Unless further appeal is made as provided for below, please notify this office of the action taken or proposed to be taken in Mr. Abbruzzese's case within 15 days after your receipt of this decision and furnish copies of any notification of personnel action issued to record accomplishment of the recommended corrective action.

Unless this decision is further appealed within 15 calendar days of the day on which it is received, it becomes the final decision of the U. S. Civil Service Commission. Any further appeal of this decision must be sent directly to:

Board of Appeals and Review
U. S. Civil Service Commission
Washington, D. C. 20415

Two copies of the letter of further appeal and all representations which the Board should consider beyond those now in the appeal file must be submitted within the 15 calendar-day time limitation.

Sincerely yours,

George J. McGuoid
Regional Director

Part 752-B Appeal of
Louis J. Abbruzzese

Copies sent to:

Regional Postmaster General
Greater New York Metropolitan Region
U. S. Postal Service
Att: Mgr., Employee Relations
Main Post Office Building
New York, N. Y. 10095

Mr. Jack Leventhal
Acting National Business Agent
Greater New York Metropolitan Region
Nat'l. Association of Letter Carriers
44 Court Street
Brooklyn, New York 11201

Mr. Louis J. Abbruzzese
2910 Sherman Place
Fair Lawn, New Jersey 07410

Michael J. Mella, Esquire
12-45 River Road
Fair Lawn, New Jersey 07410



-21-
UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY
NEW YORK FIELD OFFICE
26 FEDERAL PLAZA
NEW YORK, N. Y. 10007

IN REPLY PLEASE REFER TO

ATTN: :mh
YOUR REFERENCE

001 23 1974

Postmaster
United States Post Office
Newark, New Jersey 07102

Re: Part 752-B Appeal
Appellant: Robert G. Maier
Position: City Carrier
Agency and U. S. Post Office
Location: Newark, New Jersey

Dear Sir:

In accordance with the instructions contained in Section 752.401 of the Commission's Regulations, governing appeals from adverse actions, there is transmitted herewith a copy of the decision in the case of the above-named employee whose appeal has been considered by this office.

This letter constitutes the agency's authority to take the corrective action recommended in the accompanying decision. The corrective action should be accomplished in accordance with the instructions contained on Page V-80-31, FPM Supplement 296-31. The corrective action requires cancellation of the Notification of Personnel Action, dated April 18, 1974, which effected the appellant's resignation.

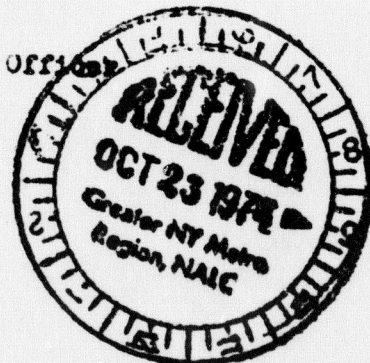
Further appeal rights are fully set forth in the concluding paragraph of the accompanying decision. If a further appeal is not submitted by the agency within 15 days, the provisions of Section 752.401 of the Commission's Regulations become operative and the recommendation shall be put into effect.

Sincerely yours,

Bert Ganzer
Chief Appeals Officer

Nature of recommendation:
Agency action reversed

Attachments:
Copy of Decision
Transcript of Hearing



UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY
New York Field Office
26 Federal Plaza
New York, N. Y. 10007

APPEAL OF ROBERT G. MAIER UNDER PART 752, SUBPART B,
OF THE CIVIL SERVICE REGULATIONS, DECIDED ON OCT 10 1974

INTRODUCTION

Name of Appellant:	Robert G. Maier
Date of Appeal:	April 29, 1974
Department, Organization and Location:	U. S. Postal Service U. S. Post Office Newark, New Jersey
Action Appealed:	Resignation from position of City Carrier, PS Level 5, Step 9, \$11,214.00 p.a.
Effective Date:	April 10, 1974

BASIS FOR ACCEPTANCE

The appellant was a veteran preference employee in the U. S. Postal Service with over one year of current continuous employment. He resigned effective April 10, 1974. His letter of appeal, dated April 29, 1974, was accepted as timely-filed.

By its very definition, a resignation is regarded as a normally voluntary action, initiated by an employee, and as such is not subject to appellate review by the Civil Service Commission. On the other hand, a resignation obtained by duress, time pressure or deception is regarded as an adverse agency action subject to the procedural requirements of Part 752-B of the Civil Service Regulations (FPM Supplement 752-1, Subchapter S1-2).

Because of appellant's allegations that his resignation had been secured under conditions of duress and deception, his appeal was accepted for resolution of this issue.

BACKGROUND

On April 10, 1974, the appellant was apprehended by Postal Inspectors in connection with an investigation into allegations of non-delivery of third-class mail on the route to which the appellant was assigned. Appellant was taken to the Belleville Annex (Newark Post Office) where, following questioning by Postal Inspectors, he requested permission to speak to first one and then another of his supervisors. Subsequent to speaking to Mr. Raymond Sinton, Manager, Detached Mails Unit, he submitted a written resignation, effective that same date, which was thereupon accepted by Mr. Sinton on behalf of the Postmaster.

A hearing was held at this office on September 11, 1974, at which appeared the appellant, accompanied by his representative, and a representative of the Postal Service. A verbatim transcript of the hearing was prepared, copies of which are forwarded to the parties, together with this decision.

ANALYSIS AND FINDINGS

The record established in this case contains appellant's resignation, dated April 10, 1974, addressed to Mr. Joseph J. Bennucci, as follows:

"For personal reasons, I find it necessary to resign my position as letter carrier assigned to North Delivery unit. My resignation to take effect 12:40 P.M. 4/10/74.

/s/ R. G. Maier"

At the hearing, appellant testified that following his apprehension and questioning by Postal Inspectors, he requested permission to speak, in turn, to Messrs. Weather and Sinton, his supervisors. He spoke first to Mr. Weather and asked if the latter could help in any way, with negative results.

Appellant testified that when he then spoke to Mr. Sinton and asked for help, the latter advised him to resign (Page 73, Hearing Transcript). Appellant testified that Mr. Sinton advised him that if he resigned all charges would be dropped (Page 74, Hearing Transcript); that, "it wouldn't be on his records" (Page 79, Hearing Transcript); and that his "chances to be reinstated would be much greater".

Mr. Sinton testified that, in response to appellant's request for help, he pointed out to the appellant the alternatives available to him (Page 32, Hearing Transcript); that he suggested resignation as one of the alternatives (Page 32, Hearing Transcript); and that administrative action would not be

taken if appellant resigned. (Page 34, Hearing Transcript). Moreover, Mr. Sinton testified that he verified these alternatives, for the appellant, with Mr. McDarby, the Postal Inspector. (Page 37, Hearing Transcript). Thereafter, Mr. Sinton testified, appellant told him that he wanted to resign. (Page 38, Hearing Transcript).

In a sworn statement dated May 29, 1974, Mr. Sinton further stated:

"I also stated that by resigning it was possible that his reemployment probabilities might be greater than if he were terminated as a result of charges".

He corroborated this statement in his testimony at the hearing (Page 51, Hearing Transcript) and further stated that he had advised appellant substantially as follows:

"That quite possibly in the future he (appellant) might seek reemployment, whether it be with the Post Office or any other section of the business world, knowing that the outside interests as well as the government screens their people, their personnel department". (Page 56, Hearing Transcript).

When asked to clarify this statement, Mr. Sinton testified:

"...I was under the impression that if you entered a resignation for personal reasons, that would be the reason why his services were terminated from the department".

A careful review of Mr. Sinton's testimony leads to the unmistakable conclusion that the impression he was trying to convey to appellant was that in the event the latter resigned, his record would contain no reference to the reasons which led up to the resignation and that prospective employers would be advised that the resignation was for personal reasons alone. It is obvious that the appellant so understood and then proceeded to act upon this information.

Postal Regulations, as well as regulations of the Civil Service Commission, clearly provide that when an employee resigns to avoid removal or other separation for cause, a notation shall be entered on the Personnel Action Form (POD Form 50) to show the circumstances under which the employee resigned. (Part 717.212, Postal Manual - Hearing Exhibit #3). Moreover, the POD Form issued in order to record the appellant's resignation contained the notation thereon as

follows:

"Resigned after being apprehended by Postal Inspection Service. - Destruction of the Mail".

CONCLUSION

Based upon all of the above, it is the conclusion and finding of this office that in submitting his resignation, the appellant relied upon information given to him by Mr. Stinton, to wit: that his record would contain no reference to his actions leading to the resignation, and that prospective employers would be informed appellant had resigned for personal reasons alone. As Mr. Sinton was the individual authorized to accept this resignation, appellant was certainly entitled to rely upon information given him by Mr. Sinton in arriving at his decision to resign. Nevertheless, as earlier noted in this decision, the information given to the appellant was in error. By relying upon this information, we find that appellant's resignation was obtained by deception.

Whereas appellant's resignation was thus obtained by deception, the agency action in separating appellant became an adverse action within the meaning and intent of Part 752-B of the Commission's regulations.

Section 752.202 of the Commission's regulations provides that an employee, covered under this subpart, and against whom an adverse action is taken, is entitled to an advance written notice of at least 30 days, stating reasons for the proposed action, specifically and in detail. He is further entitled to an opportunity to reply and to a written final decision on the proposal, prior to the effective date thereof. The record reflects that appellant was afforded none of the procedural requirements set forth above. Accordingly, it is our conclusion that appellant's separation, by resignation, was thus procedurally improper and cannot be approved.

DECISION

It is therefore the decision of this office that appellant's separation by resignation was fatally procedurally defective. Accordingly, it is hereby recommended that the separation action effective on April 10, 1974, be cancelled.

This decision constitutes your authority to take the recommended corrective action which should be accomplished in accordance with instructions contained in Federal Personnel Manual Supplement 296-31. Unless further appeal is made, as provided for below, please notify this office of the action taken or proposed

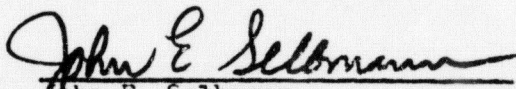
to be taken within 15 days following your receipt of this decision and furnish copies of any Notification of Personnel Action issued to record accomplishment of the recommended corrective action.

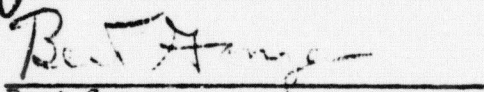
NOTIFICATION OF FURTHER APPEAL RIGHT

Unless this decision is further appealed within 15 calendar days of the day on which it is received, it becomes the final decision of the U. S. Civil Service Commission. Any further appeal of this decision must be sent directly to:

Appeals Review Board
U. S. Civil Service Commission
Washington, D. C. 20415

Two copies of the letter of further appeal and all representations which the Board should consider beyond those now in the appeal file must be submitted within the 15 calendar-day time limitation.


John E. Selbmann
Assistant Appeals Officer


Bert Ganzer
Chief Appeals Officer

Attachment:
Transcript of Hearing

NY:JES:dmh

Answer



July 17, 1972

To: Postmaster:
Brooklyn, N.Y. 11001

Dear Sir:

I, Joseph A. Marshall
SCN: 764-40-0996 - to Hereby Resigned
my job At The U.S. Postal Service
For PERSONAL Reason.

Joseph A. Marshall



-28-

UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY

NEW YORK FIELD OFFICE
26 FEDERAL PLAZA
NEW YORK, N. Y. 10007

IN REPLY PLEASE REFER TO

NY:AJR:ah
YOUR REFERENCE

Mr. Joseph Marshall
1030 Carroll Street
Brooklyn, New York 11225

AUG 23 1974

Dear Mr. Marshall:

Further reference is made to your appeal from your separation by resignation from the U. S. Postal Service, Brooklyn, New York, effective July 17, 1972. The Commission's Board of Appeals and Review reversed our March 11, 1974, decision to reject your appeal because of untimeliness and remanded the case to this office for further processing to determine whether your separation was within the purview of Part 752, Subpart B of the Civil Service Regulations.

Federal Personnel Manual Supplement 752-1, S1-2, explains the circumstances under which a resignation is an adverse action within the purview of Part 752 of the regulations:

(A) normally voluntary action . . . is an adverse action if it is obtained by duress, time pressure, intimidation, or deception. . . . It is proper for an agency to initiate a discussion with an employee in which he is given an election between leaving his position voluntarily (by resignation, optional retirement, or requesting a reduction in rank or pay) or having the agency initiate formal action against him. It is also proper for the agency in the course of the discussion to advise the employee which of the possible alternatives will be in his best interests. The fact that the employee may be faced with an inherently unpleasant situation, or that his choice may be limited to two unpleasant alternatives, does not make the resulting action an involuntary action. However, if the agency uses deception, duress, time pressure, or intimidation to force him to choose a particular course of action, the action is involuntary.

We have carefully reviewed all of the evidence of record and find that the record shows that you were faced with two unpleasant alternatives (to resign or to be fired immediately), but the record does not show that your resignation was secured through deception, duress, undue time pressure, or intimidation.

The record reflects that you resigned on the advice of Mr. Gary Fish, the attorney who was representing you at the time, after one or more postal inspectors had discussed resignation with you and Mr. Fish (Hearing, pages 17, 46-48). In our opinion, your resigning on the advice of your attorney shows that your resignation was not obtained through duress or intimidation.

Further there is no evidence that you or Mr. Fish requested additional time in which to consider choosing between resignation or being fired or that you attempted to withdraw your resignation after you had more time to reflect on the choice you had made. In our opinion, this shows that your resignation was not obtained through undue time pressure.

You contend, however, that the resignation was obtained through deception and that your case is similar to the case of Louis J. Abbruzzese, who resigned when accused of a crime but was reinstated on appeal because it was found that he relied on erroneous information supplied to him by a person in authority. You contend that you were deceived by erroneous information which postal inspectors gave to you about the benefits of resignation.

You and Mr. Fish both testified about the information you received from postal inspectors. You stated (Hearing, p. 42):

It was described this way, that I would get off, I would come out better by resigning, and would be able to have my retirement pay and what have you: it would be easier on me if I resign, more or less. That it may drop the case completely, if I resign and so forth.

Mr. Fish stated:

(Inspector Duquette) said to me that he (Mr. Marshall) should resign because if he didn't resign, if he's convicted, he will be -- even if he's not convicted, he'll be fired. He'll be fired, in other words, immediately. If he doesn't resign, he'll be fired immediately. And further, if he is fired, he will lose all his accrued benefits, whatever they are. I'm not familiar with the pension system or whatever might be accruing to him He (Duquette) told me that, point blank, that even if he were acquitted, that he would not be rehired by the Postal system, at which point I was flabbergasted, but I said to Marshall, subsequently, based on this, that I don't know what the outcome is going to be at this point, but that I feel that it would be in his interest at this point to resign and protect whatever rights might be accruing to him, and should -- in the event that he were to be acquitted of the charge, at that point, he would then fight the issue of the resignation or firing, as being coercive. (Underscoring added)

Except for the underlined material in Mr. Fish's testimony, we find no erroneous information in what you and Mr. Fish state that you were told. When an agency has evidence of criminal misconduct, an employee can be immediately removed from a duty status and fired. This administrative action would not be affected by subsequent acquittal of the employee or dismissal of the criminal charge if the removal was based on the employee's acts of wrongdoing. Further, an employee covered by the retirement system who resigns would be entitled to an annuity when he met the age requirement, and he would not subject himself to the unpleasantness of being fired under administrative procedures.

There are no "accrued benefits" that an employee can save by resigning, however. In your case the only accrued benefit that we are aware of would be a retirement benefit, and you would be entitled to it at age 62 whether you were fired or resigned, provided you did not withdraw your contribution to the retirement fund.

If you were told that you must resign in order to protect your retirement benefits, this would be erroneous information. However, both you and Mr. Fish were vague about what benefits were discussed with the inspectors. And the vagueness of your recollection, as well as the substance of it, is in sharp contrast with the testimony of Inspector Duquette.

Inspector Duquette stated that he could not recall the exact words he used two years previously in discussing the resignation (Hearing, page 60) and conceded that he might have indicated that an employee would be better off resigning. (Hearing, page 79). However, when asked specifically if he ever told an employee or his representative that the employee would lose certain rights if he did not resign, Inspector Duquette stated (Hearing, page 79):

The employee does not lose any rights whatsoever, and I've never told an employee that; no.

In view of Inspector Duquette's testimony and the vagueness of the testimony you and Mr. Fish gave about what you were told about loss of benefits, we find that the record fails to establish that the Postal Service deceived you by giving you erroneous information.

Your discussion with the postal inspectors took place over two years ago, and you could have misinterpreted what they said or have imperfect recollection of what they said after this lapse of time. For example, you stated in your appeal letter to the Board of Appeals and Review dated March 18, 1974:

It was always my impression, and I believe I had an absolute right to feel so, that after the criminal action was disposed of - and after I was exonerated - I would not have any problem returning to the Postal Service.

My legal counsel (Mr. Fish) confined himself solely to the criminal action....

Yet, at the hearing both you and Mr. Fish testified that Mr. Fish did not confine himself solely to the criminal action but, in fact, advised you about resigning. Further, Mr. Fish testified that he was told, point blank, that you would not be rehired by the Postal Service even if acquitted. Thus, the record reflects that your recollection of these matters was not accurate, and there is no evidence that your recollection of the conversations with postal inspectors was any more accurate.

In summary, and we so find, the evidence of record fails to show that your resignation was obtained by duress, time pressure, intimidation, or deception. Since your resignation was not obtained under circumstances which would bring it within the purview of Part 752 of the regulations, your separation is not within the Commission's appellate jurisdiction. Accordingly, your appeal cannot be accepted and is hereby denied.

Unless this decision is further appealed within 15 calendar days of the day on which it is received it becomes the final decision of the U. S. Civil Service Commission. Any further appeal of this decision must be sent directly to:

Appeals Review Board
U. S. Civil Service Commission
Washington, D. C. 20415

Two copies of the letter of further appeal and all representations which the Board should consider beyond those now in the appeal file must be submitted within the 15 calendar-day time limitation.

Sincerely yours,

Anita J. Ring
Assistant Appeals Officer

Bert Ganzer
Chief Appeals Officer

Enclosure:
Hearing Transcript *

(Transcript furnished to
Postmaster and Mr. Becker only.)



-32-

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS REVIEW BOARD
WASHINGTON, D.C. 20415

IN REPLY PLEASE REFER TO
ARB:rly
February 27, 1975

YOUR REFERENCE

Robert David Becker, Esq.
150 East 58th Street
New York, New York 10022

BEFORE: Jeffries, McDonald, and Roel,
Board Members.

Dear Mr. Becker:

This is in reference to the appeal on behalf of Joseph Marshall (hereinafter the appellant) from the August 23, 1974 decision of the Federal Employee Appeals Authority, New York Field Office, which found that the appeal was not within the purview of the Commission's appellate jurisdiction. That decision was based on the Field Office's determination that appellant's resignation from the position of City Carrier, Full Time, PS-5, U. S. Post Office, Brooklyn, New York, effective July 17, 1972 was voluntary, and not secured through deception, duress, undue time pressure, or intimidation as alleged.

The Civil Service Commission does not have general authority for appellate review of separations resulting from resignations. It is considered that an employee has an inherent right to resign his position at any time. Separations resulting from the exercise of such rights are considered to be voluntary in character and thus not subject to appellate review by the Commission. However, the Commission may review on appeal a resignation when it is shown that the resignation was given under such conditions of duress, coercion or misrepresentation as to establish that the separation was, in effect, a removal action initiated by the agency.

The Field Office found, after conducting a hearing, that appellant's resignation was not obtained through undue time pressure; and that the appellant resigned on the advice of his attorney showing that the resignation was not obtained through duress or intimidation. The Field Office noted that discussions did occur between the appellant and Postal Service officials regarding the consequences of his alleged misconduct.

On appeal to the Board you make substantially the same representations as those presented to the Field Office. You specifically allege that the preponderance of the evidence proves that the resignation was obtained by duress. You also referred to several cases decided by the Field Office, apparently concluding that any resignation obtained after the employee has been accused of a crime is obtained under duress.

After a complete review of the evidence of record, the Board concurs with the decision of the Field Office that the appellant's decision to resign, although suggested by agency officials, as a possible alternative to his removal, was voluntary and was not obtained under duress, time pressure or intimidation. The evidence does not support a conclusion that his resignation was secured based on deception involving alleged erroneous information concerning retirement benefits. The appellant testified that he was told that he "would come out better by resigning, and would be able to have (his) retirement pay and what have you". (Transcript pg. 42) However, the appellant does not allege, nor does the record indicate, that he resigned based on the statement that he must resign in order to protect his retirement benefits. Moreover, the postal inspector testified that he never told any employee that the employee would lose certain rights if he did not resign (Tr. pg. 72)

The fact that an employee may be faced with an inherently unpleasant situation or that his choice may be limited to two unpleasant alternatives does not, per se, make the resulting action an involuntary action. Therefore, it is not improper for an agency to initiate a discussion with an employee in which he is given an election between leaving the agency voluntary (by resignation) or facing charges.

The evidence in this case shows that the appellant's decision to submit his resignation was voluntary and was based on his desire to avoid facing charges stemming from his alleged criminal acts.

In view of the foregoing, the Board concurs with the decision of the New York Field Office that appellant's resignation was not obtained under circumstances which would bring it within the purview of the Commission's jurisdiction. Therefore, the decision of the New York Field Office issued August 23, 1974, is hereby affirmed.

Civil Service regulations provide that the decision of the Board is final and there is no further right of administrative appeal.

For the Commissioners:

Sincerely yours,

Herman D. Staiman
Herman D. Staiman
Chairman

WARNING AND WAIVER

- a. Before you are asked any questions you must understand your rights.
- b. You have a right to remain silent.
- c. Anything you say can be used against you in court.
- d. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.
- e. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.
- f. If you decide to answer questions now without a lawyer present you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signature _____

Date _____

Witnessed by: _____

J.P. Squitti 7/17/72, Postal Inspector

Witnessed by: _____

Paul C. Walter

(Title)

Witnessed by: _____

(Title)

1 ceive back pay under the Veterans Preference Act and
2 that he resignation should be terminated an adverse ac-
3 tion under the Veterans Preference Act, and this is
4 what we intend to prove today.

5 MS. RING: Thank you, Mr. Becker.
6 Mr. Stokes, do you have an opening statement for the
7 civil service?

8 MR. STOKES: There is no basis for
9 the charge by Mr. Marshall that his resignation was
10 other than voluntary.

11 On July 17, Mr. Marshall's resignation was
12 received by a representative of the Postmaster at New
13 Lots Station and was received in the office of the
14 Postmaster on July 18, which is shown by a postmark.

15 The personnel action, the form POD 50, was
16 processed on August 10, 1972 after receiving a letter
17 from Postal Inspector L. P. Duquette, notifying the
18 Postmaster of the arrest of Mr. Marshall and making
19 the determination of no government losses.

20 At no time between Mr. Marshall's arrest
21 on July 17, 1972, the preparation of the Personnel
22 Action dated August 10, 1972, and his letter received
23 February 12, 1974, by the U.S. Civil Service Com-
24 mission, was there any record of Mr. Marshall making any
25 attempt to contact the Postmaster or representatives

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1 of the employer, Labor Relations Section, regarding his
2 resignation.

3 If Mr. Marshall had made such request, he
4 would have been given consideration as warranted, and he
5 would have been answered in writing.

6 The resignation received by the Postmaster's
7 representative and made part of Mr. Marshall's person-
8 nel folder, shows his resignation to be strictly a
9 voluntary act on his part. The appellant's personnel
10 records were subsequently handled on the normal manner,
11 which means, after 30 days of retention at the instal-
12 lation, they are forwarded to the record center in St.
13 Louis.

14 Nothing was heard or received from Mr.
15 Marshall till 19 months later, when his case was
16 appealed to the United States Civil Service Commission.

17 MS. RING: Does that conclude your statement?

18 MR. STOKES: That concludes my statement.

19 MS. RING: Mr. Becker, are you --

20 MR. BECKER: -- One statement I'd like to add.

21 MS. RING: Okay.

22 MR. BECKER: First of all, that the 19-month
23 period is actually irrelevant because Mr. Marshall,
24 through his attorney, Robert Becker, notified the
25 postal authorities almost immediately after he was

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212/697-47589

MARSHALL-direct

9

1 Q And what was your first position with the Post
2 Office?

3 A My first position with the Post Office was a
4 clerk.

5 Q And what did you tehn dc after you were a clerk?

6 A I changed over to carrier.

7 Q And what year was that?

8 A That was in the year of 1970, I think it was.

9 Q 1970?

10 A Right.

11 Q You became a carrier?

12 A I think so.

13 Q And did you remain a carrier until July 17, 1972?

14 A Yes, I did.

15 Q And what was your title on that date?

16 A My title was Letter Carrier with regular route.

17 Q With a regular route?

18 A Right.

19 Q And where was your route?

20 A My route was at New Lots Station, Route 16, cover-
21 ing areas that are in the New Lots Area.

22 Q Now, on or about July 17, 1972, did the postal
23 authorities accuse you of some crime?

24 A Yes, they did.

25 Q What crime did they accuse you of?

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MARSHALL-direct

10

1 A Mail theft.

2 Q And were you arraigned at the United States Dis-
3 trict Court in Brooklyn for this crime?

4 A Yes, I were.

5 Q And how did you plead at your arraignment?

6 A I pleaded not guilty.

7 Q And subsequently, on or about January 4, 1974,
8 what happened in the United States District Court with
9 regard to these criminal charges against you?

10 A On January 4, 197-- of this year, my case was
11 completely exonerated.

12 Q And were the charges dismissed?

13 A Yes.

14 Q Now, Mr. Marshall, at the time that you were ini-
15 tially indicted for mail fraud, had you retained an attorney
16 named Perry Fish?

17 A I did.

18 Q And when did you first see him?

19 A I saw Attorney Fish the same day that I were ar-
20 rested in the afternoon.

21 Q Mr. Marshall, after you were first arrested, what
22 happened to you?

23 A After I was arrested, I were taken from New Lots
24 Station to Atkins Avenue and the inspectors parked at that
25 corner of Atkins Avenue and Sutter. And we were parked

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MARSHALL-direct

11

1 at that designation for about an hour, almost an hour.

2 As the car was parked, I was questioned by the
3 inspectors, two in front, one in the back.

4 Q Were you advised that you had a right to have a
5 lawyer at that time?

6 A NO, I did not.

7 Q Did they tell you you had a right to have a
8 lawyer?

9 A They did not.

10 Q Did they advise you that anything you said could
11 be held against you?

12 A They did not.

13 Q Did they advise you that you had the right to
14 remain silent?

15 A They did not.

16 Q Did they tell you you were being accused of a
17 crime?

18 A They did.

19 Q Did they advise you that if you did not have the
20 money to call a lawyer, that they could give you a dime to
21 call a lawyer?

22 A They did not.

23 Q After you were questioned by these inspectors,
24 then what happened?

25 A After I were questioned by the inspectors at

MARSHALL-direct

12

1 Atkins and Sutter, they told me that they were trying to
2 watch a house that the so-called mail that I was supposed
3 to have stolen until they tried to find someone that was
4 connected with the incident.

5 Q Mr. Marshall, do you know the names of these
6 inspectors that were questioning you in the car?

7 A I do not.

8 Q Would you recognize them if you saw them again?

9 A I will.

10 Q Could you describe them as far as if they were
11 white or black?

12 A They were white at the arresting, at New Lds,
13 three whites, three white inspectors. One kind of an elder
14 gentleman, white hair, in the neighborhood of, oh, I'd
15 say about 60, seems like, and two other younger fellows.

16 Q All right, then, Mr. Marshall, what happened
17 after approximately one hour, when you were in the car?

18 A After the one hour I were in the car, they were
19 waiting on a call from, I imagine from downtown, and after
20 they didn't receive a call, then we proceeded to go down-
21 town to the Postal Inspectors' Office.

22 Q Now, in this hour in the car, did these in-
23 spectors ever mention anything about suggesting you to
24 resign?

25 A Yes, I was approached stating that it would be

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MARSHALL-direct

13

1 better for me if I resign.

2 Q In the car they told you this?

3 A In the car. And also, the inspector that were
4 in the back said that you are guilty; you might as well
5 say you were guilty, more or less.

6 Q Then what happened, Mr. Marshall?

7 A Then we went downtown to the Postal Inspectors'
8 Office in Brooklyn, upstairs. There I were told to make
9 out a statement.

10 Q At the postal --

11 A At the Postal Inspectors' Office.

12 Q Did you make out a statement?

13 A Yes, I did.

14 Q Do you remember what the statement said?

15 A Well, the statement stated that the complete,
16 from the morning, six o'clock, up until I were arrested,
17 exactly what I did, how I did it, and when I returned.

18 Q What your itinerary was that day; is that
19 correct?

20 A Right.

21 Q And did you proclaim your innocence throughout
22 this statement?

23 A Throughout my statement I proclaimed that I was
24 not guilty.

25 Q And did you proclaim your innocence throughout

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1 your conversations with these inspectors?

2 A I did.

3 Q All right, then what happened after you made
4 out this statement?

5 A While I was sitting making out the statement
6 with the elder gentleman, which I don't know the name,
7 I were mentioned -- cautioned again about on the verge
8 of resigning.

9 After I made out the statement, I was taken into
10 the room where the pictures was taken and fingerprinted.

11 Q Where was this?

12 A It was at the Postal Inspectors' Office.

13 Q You were fingerprinted and your pictures were
14 taken?

15 A At that office.

16 Q I see. Then what happened?

17 A Then from there we went on to the Federal Building
18 which was across the street from the Main Post Office.

19 Q Were you brought before a United States Magis-
20 trate at that point? Were you taken to the jail?

21 A I was taken to the jail, downstairs.

22 Q Do you remember about what time this was?

23 A On or about, say about quarter to six or quarter
24 after, I really don't know the exact time.

25 Q At night?

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MARSHALL-direct

15

1 A At night.

2 Q How long did you remain in the jail?

3 A I remained in the jail, which I was not locked up,
4 I remained outside with the other so-called fellows that
5 were with me in the theft of mail, and I remained outside
6 for about a little over an hour.

7 Q At that point, what happened?

8 A My picture was taken again and fingerprinted
9 again. And I, well -- in other words, I made a phone call
10 to Perry Fish, New York City. In fact, I made a phone
11 call before I went over to the Federal Building, the phone
12 call, I made another phone call to Perry Fish's office.

13 Q I see. And when did you first see Mr. Fish?

14 A I saw Mr. Fish at the arraignment downstairs,
15 he came in just before we were getting ready to be taken
16 upstairs.

17 Q And how long did you speak to him?

18 A I spoke with him about 15 minutes, 15 to 20 min-
19 utes, I imagine, something in that neighborhood.

20 Q And then you were brought upstairs?

21 A I was brought upstairs, to be arraigned in
22 front of the judge.

23 Q To be arraigned in front of the judge.

24 A Right.

25 Q And you were arraigned, is that correct?

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MARSHALL-direct

16

1 A I was.

2 Q And what did you plead at the arraignment?

3 A I pleaded not guilty.

4 Q Then did you speak to Mr. Fish again?

5 A I spoke to Mr. Fish upstairs.

6 Q And what did he say to you concerning the resig-
7 nation?

8 A Mr. Fish stated concerning the resignation, the
9 resignation were confirmed to me upstairs also again.

10 Q Now, what do you mean by confirmed to you up-
11 stairs.

12 A In other words, it was mentioned that if I resign,
13 it would be better for me to resign than --

14 Q Who told you this, Mr. Marshall?

15 A Well, actually it was carried through Mr. Fish
16 from one of the gentlemen, I imagine?

17 Q In other words, Mr. Fish -- did he tell you that,
18 after having conversation with one of the gentlemen, that
19 according to this conversation you would be best off in
20 resigning?

21 A Yes, he mentioned that concerning the gentlemen,
22 through the gentlemen and what have you. In fact, he
23 spoke with the gentlemen concerning the resigning, trying
24 to get information of that effect.

25 Q And how long did you talk to Mr. Fish about

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1 MARSHALL-direct
2 this resignation?

3 A About 15 minutes.

4 Q And what did he advise you?

5 A He advised me to resign.

6 Q And he told you, or did he tell you that after con-
7 versations with the postal inspectors that you would be best
8 protected by resignation rather than by being fired?

9 A Right.

10 Q And did you actually, then, sign a resignation?

11 A Yes, I was given a sheet of paper, yellow sheet
12 of paper like that you have in front of you by the inspec-
13 tors?

14 Q And where were you given this paper?

15 A I was given it right in front of -- upstairs in
16 the court.

17 Q In the courtroom?

18 A Right.

19 Q And you signed it at that time?

20 A I made it out and signed it at that time.

21 Q Now, Mr. Marshall, you know that you belonged to
22 a union at that time, is that correct?

23 A Yes, I do.

24 Q Were you ever afforded an opportunity to speak to
25 any union representative at any time after you were first

1 MARSHALL-direct

2 questioned by postal inspectors until the time that you
3 resigned?

4 A I was not. In fact, I wanted to speak with the
5 union representative of my station, Genaro Esposito.

6 Q Yes?

7 A At that time, he was not back at the station from
8 his route, and the inspectors did not wait around. They
9 taken me right out, right into the car, to the destination
10 downtown.

11 Q Did you tell the inspectors you wanted to speak
12 to your union representative?

13 A I wanted to speak to Esposito.

14 Q Did you tell that to the inspectors?

15 A I did.

16 Q What was their response?

17 A No response. They taken me downstairs to check
18 my locker and what have you and so forth, and from there
19 they taken me down to Atkin Avenue and Sutter, and from
20 there to the main Post Office.

21 Q Mr. Marshall, from the time that you were first
22 questioned about implication in this alleged crime until
23 the time that you actually executed the resignation, how
24 many hours passed, approximately?

25 A From the time that I was arrested and from the

1 MARSHALL-direct

2 time --

3 Q Right, from the time that you were first questioned
4 by the postal inspectors.

5 A Well, the time I was first questioned was in the
6 neighborhood of about, I'd say, on or about, around about
7 1:30, I think it was.

8 Q In the afternoon?

9 A In the afternoon.

10 Q And approximately what time did you resign, do you
11 remember?

12 A Approximately, I would say about quarter -- I'd
13 say about 20 after six or quarter to seven.

14 Q In this five or six hour period, would you describe
15 how you felt, Mr. Marshall?

16 A I felt very nervous, very broken up and very
17 scared.

18 Q Had you ever been accused of any crime at any time
19 prior to this incident?

20 A I was never accused of any crime whatsoever, and
21 at the post office as well as anywhere else, my record can
22 speak for my ability to work and ability to carry out orders
23 and so forth.

24 Q Had you --Mr. Marshall, had you ever had any ex-
25 perience with this type of a proceeding before, what oc-

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1 MARSHALL-direct

2 curred on July 17, 1972?

3 A I never have.

4 Q Do you feel that your resignation was not
5 voluntary?

6 A I feel that my resignation was not voluntary. I
7 feel that my resignation was pressured.

8 Q Mr. Marshall, would you like to obtain your posi-
9 tion back?

10 A I would like to obtain my position back, yes.

11 Q Would you like to get your back pay back?

12 A Yes.

13 Q Has the period of time that you have been without
14 your regular job with the Post Office created serious economic
15 difficulty for yourself and your family?

16 A Very much, create tremendous difficult including
17 the behavior of kids and also hardship on my family.

18 Q Have you, in fact, been served with proceedings
19 for eviction from your dwelling because of your lack of
20 funds?

21 A I have, three times.

22 Q Three times.

23 A Yes.

24 Q How have you attempted to earn monies for yourself
25 in this period of time since July 17, 1972?

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MARSHALL-direct

A By borrowing from numerous friends, from family and pension with the disability compensation that I received from the Government.

Q And you're still receiving that; is that correct?

A I am.

Q Mr. Marshall, do you recall the reason why Mr. Fish did not remain your lawyer, and myself, Robert Becker, eventually became your lawyer in this Federal criminal proceeding?

A Yes, I would.

Q What is the reason?

A Mr. Fish, did not become my lawyer due to the fact of finance. I was unable to pay him the fee that he requested.

Q You were unable to pay his fee?

A Yes.

Q Then subsequently I was appointed by the Federal court to represent you; is that correct?

A That is correct.

Q And my fee was paid by the Federal Government; is that correct?

A That is correct.

Q Mr. Marshall, the statements that you have made this morning, have you ever rehearsed the statements with

MARSHALL

some additional questions?

REDIRECT EXAMINATION

BY MR. BECKER:

Q Mr. Marshall, did you state that you overheard some of the conversation between the postal inspectors and Mr. Fish in the courtroom that evening?

A Yes, I did. It was a matter of resigning, not resigning, and benefit of me.

Q And did you hear some conversation to the effect that it would be to your best interest if you resign?

A Yes, I heard conversation to that effect and I was --

Q Who made that statement that you heard?

A Actually quite a few peoples in there before the judge came.

Q Was it one of the inspectors?

A It was sort of -- yes, it was the inspectors there. Which one, I don't think I --

Q Would you recognize the inspector if you saw him?

A Yes, I would, I'm quite sure I would.

Q Do you remember what he looked like?

A He was white, tall and very hard. He was very tall, yes.

Q Mr. Marshall, who did you give the resignation to?

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MARSHALL-redirect

(Document shown to the witness.)

A That is what I -- that's my writing there.

Q It's your writing?

A Yes.

Q And it states, "I, Joseph Marshall, No. 264-40-0996, do hereby resign my job at the U.S. Postal Service for personal reasons." Joseph H. Marshall. Right?

A Right. And can I add something? That was -- the statement were given to me by one of the inspectors how to write this out to resign. I did not know. I said, "How can I write this out?"

Q The inspector told you what to write?

A Yes, he told me.

Q He dictated --

A I didn't know, I did not know exactly what to write, how to word this, so this is the way it was worded.

Q Mr. Marshall, did he dictate this to you? By dictate, did he state to you word for word, "Please write this," and you wrote after what he said?

A He did not, he just read straight through, "I hereby resign from the post office," so and so on, and I did not know whether to give my -- that is my Social Security number. I did not know anything about giving my Social Security number until I was told.

1 MARSHALL-redirect

2 Q And, Mr. Marshall, was that the same inspector
3 that had been speaking to Mr. Fish, that you overheard the
4 conversation?

5 A Yes, I'd know him.

6 Q That was the same man?

7 A Same man. It was more than one inspector in
8 there because I think it was two inspectors, in there,
9 I'm quite sure, I don't know, quite a few peoples.

10 Q At the time that this inspector dictated this
11 statement that you wrote, Mr. Marshall, were you told of
12 any appeal rights that you had involving the resignation?

13 A I was not told of any appeal right whatsoever,
14 of any kind.

15 MR. BECKER: No further questions.

16 MS. RING: Mr. Stokes, you have some
17 other questions?

18 MR. STOKES: Yes.

19 MS. RING: You may ask them now.

20 RECROSS EXAMINATION

21 BY MR STOKES:

22 Q Mr. Marshall, did you receive a copy of your
23 POD Form 50; did you receive a copy of this?

24 A Yes, I received a copy of it.

25 Q When did you receive it, sir, do you know approx-

1 MARSHALL-recross

2 imately?

3 A Off the record -- not off the record, rather -- I
4 received that, oh, I'd say -- I'd say about maybe three to
5 -- three weeks or something like that, three weeks, I don't
6 know exactly the time, but I did not receive it the next
7 day or the next day.

8 Q All right, Mr. Marshall, when you received this,
9 did you read it?

10 A Yes, I read it.

11 Q And did you read in the remarks, Item 30?

12 A I can't recall Item 30.

13 MR. STOKES: Mr. Leventhall, would you let
14 Mr. Marshall see the copy of the #50, please?

15 (Document shown to the witness.)

16 A Yes, I read that.

17 Q Mr. Marshall, at the time or at the receipt of
18 the POD Form 50, were these statements, "resign volun-
19 tarily, personal reasons", "employee resigned after being
20 apprehended on 7/17/72 for the theft of letter mail" and
21 "there are no government losses chargeable to this employee;
22 therefore all funds due him may be released" -- did you at
23 any time after you received this POD Form 50, make any
24 effort or attempt to contact either the Postmaster,
25 Employee Labor Relations or your union representatives

-54-

39

MARSHALL-recross

concerning this POD form 50 you received?

A Yes, the same day I tried to get in touch with Esposito, I think it was, and at that time, he was out. He was not working, in other words, and I didn't know who else to call to try to straighten this out whatsoever, so I did not do anything other than call Esposito, trying to get in touch with him, the day I received this.

Q Were you ever able to contact anyone, either by the Postmaster representatives or your union representatives concerning this POD Form 50?

A I just said that the union representative I tried to contact, to know the next step, the next procedure.

Q Subsequent to that?

A The next step, to know the next step or procedure.

Q But at no time that you made any contact of anyone, am I to understand, either by the union or the Postmaster's representative, concerning this POD Form 50?

A My first contact should be the union representative. From there it goes on. This I tried to do.

Q I'm asking you, did you; were you able to make contact with either your National Association of Letter Carriers or --

A No, I was not.

Q (Continuing.) Or the Postmaster or his representa-

MARSHALL-recross

tives?

A No, I was not.

MR. STOKES: All right.

MS. RING: Does that conclude your question-
ing? Mr. Becker.

MR. BECKER: Yes, a couple of questions.

REDIRECT EXAMINATION

BY MR. BECKER:

MR. BECKER: Mr. Stokes, on the POD Form 50,
this is the only form that Mr. Marshall received after
he resigned; is that correct, from the Post Office;
aside from any back pay he had coming?

MR. STOKES: No.

MR. BECKER: Did he receive any other forms?

MR. STOKES: There are other forms that -
this is just a copy of the personnel action. Yes,
there are other forms that he would get.

MR. BECKER: That he would get? Is there
anything on this POD Form 50, which says that he has
a right to appeal his resignation?

MR. STOKES: No, this is -- being voluntary,
there's no -- there's nothing put upon there

MR. BECKER: Please, just answer the question.

MR. STOKES: Being voluntary, employee re-

FISH-direct

Q Where did you see him first?

A In the Marshal's Detention Pens.

Q And how long did you speak to him?

A I would say approximately half an hour.

Q And you --

A Shorter or longer, but about that.

Q And you received some information concerning the charges; is that correct?

A That's correct.

Q And then you went upstairs?

A That's correct.

Q Where he was to be arraigned; is that correct?

A That's right, in Magistrate's Court.

Q And how was he arraigned? What did he plead?

A He plead not guilty to an information before the magistrate. And I think personal recognizance bond he gave.

Q Mr. Fish, at that point, did you have any conversations with any postal inspectors in the courtroom?

A I did.

Q Do you remember who you discussed Mr. Marshall's case with, or do you remember what he looked like? If there was only one man?

A I believe it was Mr. Duquette who I recognized coming in this morning.

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1 FISH-direct

2 Q It was the same gentleman?

3 A I believe so. He told me he was present at that
4 arraignment.

5 Q And could you describe him for the record?

6 A He has, I guess he's in his 40's or so, and he's
7 got reddish hair --

8 Q Caucasian?

9 A Caucasian. I had asked him at the time if he were
10 from the Postal Department. He apparently was. He seemed
11 to be wearing the blue shirt and the kind of uniform that
12 one associates with a postal worker, and I tried to learn
13 some of the facts of the Marshall matter at the time.

14 We had further conversation in which he said to
15 me that I should inform my client, which at that time was
16 Mr. Marshall --

17 Q Mr. Marshall was present, wasn't he?

18 A No, Mr. Marshall was not present at that time.

19 Q Hewasn't present?

20 A No. To resign. And I was told this by him; I
21 asked him why should he resign, the man has only been ac-
22 cused; he's not been convicted of anything. And at that
23 point I still had not received all the facts from Mr.
24 Marshall. I just had had a brief visit with him in the
25 Marshal's pens, and I hadn't even studied the information

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FISH-direct

and he said to me that he should resign because if he doesn't resign, if he's convicted, he will be -- even if he's not convicted, he'll be fired. He'll be fired, in other words, immediately. If he doesn't resign, he'll be fired immediately. And further, if he is fired, he will lose all his accrued benefits, whatever they are. I'm not familiar with the pension system or whatever might be accruing to him.

And I said to him, would not a letter of resignation held in escrow by me or some other -- in some other form or shape that we could work it out, but I didn't think it was fair to find the man guilty before he even had a trial or a day in court.

He told me that, point blank, that even if he were acquitted, that he would not be rehired by the Postal system, at which point I was flabbergasted, but I said to Marshall, subsequently, based on this, that I don't know what the outcome is going to be at this point, but that I feel that it would be in his interest at this point to resign and protect whatever rights might be accruing to him, and should -- in the event that he were to be acquitted of the charge, at that point, he would then fight the issue of the resignation or the firing, as being coercive.

Q And you based this statement to Mr. Marshall upon

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1 FISH-direct

2 interest to resign; is that correct?

3 A That's correct, and from what I gather, after
4 the further conversation, would be the only way; otherwise
5 he would have been fired.

6 Q And did you have any personal knowledge of the
7 workings of the Civil Service at that time?

8 A None.

9 Q And were you given the impression that this resig-
10 nation should be made immediately?

11 A Yes, I was.

12 Q That if it wasn't, he would be fired?

13 A He would be fired forthwith, I was told that.

14 Q Forthwith?

15 A I was told that, unequivocally. Moreover, not
16 only was I told that; I was told that even if he were
17 acquitted, he wouldn't be hired.

18 Q That was in response to your argument, suppose
19 he's actually acquitted of these charges?

20 A Right, I said, "I just met this man for fifteen
21 minutes or whatever, half an hour. I have no knowledge of
22 all the facts. I have to have an investigator get to work
23 on the matter," And it didn't make any difference. This
24 is what I was told.

25 Q Mr. Fish, did you continue representation of Mr.

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1 FISH-direct

2 Marshall?

3 A Yes, we continued representing Mr. Marshall until
4 the time he was arraigned, I believe it was before Judge
5 Dooling, when an indictment was subsequently handed down.
6 I believe Mr. O'Brien was the U.S. Attorney on the case at
7 the time, John O'Brien, and subsequently, we were re-
8 lived, pursuant to ex-parte motion because Mr. Marshall
9 could not afford the fee, and Mr. Becker, I believe, was
10 assigned to the case.

11 Q This was in August or September of 1972; is that
12 correct?

13 A Right, several months after the initial magis-
14 trate's arraignment.

15 Q And did you have any contact with Mr. Marshall
16 since?

17 A No, I have not, other than to say good morning to
18 him this morning.

19 Q And, Mr. Fish, do you have any interest in the
20 outcome of this particular proceeding?

21 A None at all.

22 Q Do you have any agreement that any legal fee that
23 your firm may be owing because of the work that had been
24 done up until the time that you were relieved, will be
25 paid out of any back pay that he may get?

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1 DUQUETTE-direct

2 point to any testimony that the actual criminal charges
3 or what he is accused of are really irrelevant to this
4 issue and that this be stricken from the record, and
5 that the witness be requested not to go into these
6 details.

7 MS. RING: You weren't interested in his going
8 into these details, were you, Mr. Stokes?

9 MR. STOKES: I was, yes, I was, because
10 there has been an allegation in regard to this that
11 there was no criminal act whatever on his part, and
12 I would have the inspector to give the details that
13 there has been only one side of the story to be given
14 to why Mr. Marshall is here appealing this hearing,
15 and my reason for having Inspector Duquette here is
16 to lead up to the fact and to find out whether Mr.
17 Marshall was given his rights.

18 MS. RING: The question of whether he was
19 explained his rights is relevant but not the charges
20 in the case, so if you would limit your questions to
21 what Mr. Marshall was advised and the circumstances
22 relating to the resignation.

23 BY MR. STOKES: (Continuing.)

24 Q Inspector Duquette, at the time of Mr. Marshall's
25 arrest, was he ever told or given his rights, rights to

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1 DUQUETTE-direct

2 counsel or whatever rights that he was entitled to by
3 law?

4 A Yes, he was.

5 Q What were those rights stated to, Inspector
6 Doquette?

7 A The rights -- well, he was originally given his
8 rights verbally, and then he signed a written waiver of his
9 rights.

10 Q But he was at the time of his arrest in the car
11 with the inspectors told of his rights that he had?

12 A That's correct, yes he was.

13 Q Inspector, do you have a copy of this written --
14 that we may have examined?

15 A Yes, I have.

16 (Document produced.)

17 MR. BECKER: I'd like to ask the witness,
18 since they've brought this paper up, when this --
19 where and when and the circumstances under which this
20 document was executed by Mr. Marshall?

21 THE WITNESS: This was signed by Mr.
22 Marshall on the 17th.

23 MR. BECKER: I would like to note for the
24 record that it's dated 7/16, and then beneath, it says
25 7/17/72.

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1 DUQUETTE

2 MS. RING: Would you have any objection to
3 having a copy of this put in the hearing record?

4 MR. BECKER: Well, I would like to find out
5 the circumstances of this document, then I would
6 place any objections if I believe they're necessary.

7 THE WITNESS: This was signed in my office
8 at the General Post Office in Brooklyn, New York.

9 VOIR DIRE EXAMINATION

10 ON DOCUMENTARY EVIDENCE

11 BY MR. BECKER: (Continuing.)

12 Q In the general post office?

13 A That's correct.

14 Q And had you spoken to Mr. Marshall in an automo-
15 bile outside of the -- near his route on the morning of
16 the 17th?

17 A No, I didn't.

18 Q Do you know if any other inspectors had?

19 A The first time I saw Mr. Marshall, I believe,
20 was at the New Lots Station.

21 Q Was at the New Lots Station?

22 A That's correct.

23 Q Do you know if any inspectors had spoken to Mr.
24 Marshall in a car after he'd been first stopped?

25 A I can say that Mr. Marshall was taken from New

1 DUQUETTE

2 it was executed, and as will come out in cross-
3 examination.

4 MS. RING: It will be given whatever weight
5 it deserves.

6 MR. DUQUETTE: I don't have copies.

7 MR. BECKER: You could have a copy made up.

8 MS. RING: Mr. Stokes, would you continue
9 with your questions of this witness?

10 BY MR. STOKES: (Continuing.)

11 Q Inspector Duquette, Mr. Marshall states that his
12 resignation that he wrote and handed to you and the manage-
13 ment representative was strictly involuntary. Can you
14 tell me, Inspector, at the time of his resignation, what was
15 said in regard to this resignation?

16 A I don't recall the exact words what was said. I
17 can tell you what normally happens.

18 MR. BECKER: I'm going to object. This is
19 not relevant to what normally happens. The only thing
20 that's relevant is what happened with Mr. Marshall in
21 this particular case, not standard office procedure.

22 MS. RING: Mr. Stokes, do you have any com-
23 ment on that objection?

24 MR. STOKES: I feel that there's no basis
25 for the objection on this, due to the fact that these
resignations are basically handled the same way, and

DUQUETTE-direct

THE WITNESS: Well, as I previously stated, I can't recall exactly what was said. This is two years later, approximately two years later. However, if the question of his job comes up, we're principally concerned with the criminal aspect and not the postal employee's job.

But normally, the postal employee will say, I'm not saying that Mr. Marshall said this, I'm saying that normally the postal employee would say, "What happens to my job?"

MR. BECKER: I'm going to object. That's not relevant to this hearing.

MS. RING: Your objection is noted, and you may continue with your answer.

THE WITNESS: If Mr. Marshall did say, "What about my job?" he is told that we have to report to the Postmaster that he was arrested for the theft of mail, and the Postmaster will take steps to issue him a letter of charges or a letter of adverse action, whatever you want to call it, or he can resign from the postal service. This is the normal case. There has been times when I have brought the subject up, prior to the new union contract, at times I did mention to the employee, "You have a problem about

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1 DUQUETTE-direct

2 your job," and I would tell him exactly the same thing:
3 I have to notify the Postmaster that you were arrested
4 unless you want to resign. The choice is yours."

5 MS. RING: Mr. Stokes, do you have other
6 questions?

7 MR. STOKES: I have no further questions at
8 this time. Oh, yes, I have one question.

9 BY MR. STOKES: (Continuing.)

10 Q Inspector Duquette, Mr. Marshall stated that at
11 his time of arraignment, that the resignation was handed
12 to Attorney Fish, who then had the case to be presented.
13 Do you recollect --

14 MR. BECKER: Again I'm going to object. I
15 objected to this question the last time. I believe
16 the record shows that Mr. Marshall indicated he did
17 not remember who he gave the resignation to. He
18 remembered that he wrote it out, and it was dictated
19 to him, whether it was given directly to the postal
20 inspector or to his attorney, he doesn't recall.

21 MR. STOKES: I withdraw the question.

22 MS. RING: Then you have no further questions?

23 MR. STOKES: I have no further questions at
24 this time.

25 MS. RING: Mr. Becker, you may cross-examine.

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DUQUETTE-cross

A No, his attorney was not present.

Q Had he called a lawyer up until that time?

A I don't recall.

Q Do you remember when he executed this document which you call a waiver of rights?

A Yes. When he reached the General Post Office.

Q At that time?

A That's correct.

Q Do you know how much time elapsed between the time he was first arrested, stopped by postal inspectors until the time that he reached your office?

A No, I don't. He was verbally advised originally as I stated originally.

MR. BECKER: Objection.

Q Did you verbally advise him?

A Yes, I did.

Q And what point was this?

A At the New Lots Station Post Office.

Q And what did you advise him of?

A I advised him of his rights.

Q What rights did you advise him of?

A I told him that he had a right to remain silent.

Anything he said could be used against him. He has a right to an attorney. If he can't afford an attorney, an attorney

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DUQUETTE-cross

will be appointed for him without cost.

Q did you have any discussion with him at that time about resignation?

A At that time?

Q Yes, in the post office.

A No.

Q New Lots Station.

A No.

Q Did you have any discussion with him in the car about resignation.

A No.

Q Did you have any discussion with him about resignation at your office in the postal building?

A Possibly.

Q And do you remember what you advised him or what you said to him about resignation?

A No, I just stated what normally happens. I don't recall the exact words.

Q What would you have normally stated?

A What would I normally do?

Q Yes.

A I said if a postal employee is concerned about his job, in most cases they are, what happens to my job, at that point he is told that we have to report to the

1 DUQUETTE-cross

2 Postmaster that the employee is arrested for the theft of
3 mail, whatever the case may be, and a letter goes to the
4 Postmaster giving him the details, and a letter of charges
5 or adverse action will be issued the employee, or he has
6 a choice of resigning.

7 Q So, when you make this statement, it's weighted
8 that it appeared it would be in the best interest of the
9 employee to resign; is that correct?

10 A No, sir, it's not. He has a choice.

11 Q But when you state that he has a choice, of
12 course he has, you've given him a choice, but isn't it
13 weighted that it appears that he's best off in resigning?

14 A I don't know, depends on how he feels about it.

15 Q Aren't you attempting to get him to resign at
16 that point.

17 A No.

18 Q You're not. Well, why would you be bringing it
19 up?

20 A I told you, if a postal employee asks what hap-
21 pens to his job, it's explained to him that there's two
22 alternatives. One is that we will notify the Postmaster
23 by a letter, and the Postmaster will take any action he
24 sees fit, or the employee has a choice of resigning.

25 Q Mr. Duquette, are you fully familiar with the

DUQUETTE-cross

postal workers' rights under the Civil Service Act?

A No, not all of them.

Q It's not your area; is that correct?

A That's correct.

Q And are you familiar with -- are you familiar with his rights with regard to the fact that he belongs to the union, and the union's agreement with the postal authorities?

A I believe that the union agreement you're speaking about came up subsequent to his arrest.

Q And what agreement is that?

A That we were under no conditions to discuss resignation with a postal employee -- this is my instructions, I don't know what the union agreement says, this is my instructions from my superiors.

If an employee discusses resignation, he will be escorted or advised to report to the Postmaster's Office or the Personnel Office. We will not discuss resignation.

Q And do you know the reason for this agreement?

A NO, I don't.

Q In the case of Mr Marshall, do you recall discussing resignation with Mr. Marshall's then attorney, Mr. Fish, in the magistrate's courtroom in the Eastern District on that day--Mr. Fish is the gentleman you saw --

A Yes, I saw him, in fact I recognized him. I don't

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DUQUETTE-cross

recall.

Q Is it possible you may have had discussions with Mr. Fish at that time?

A It's possible, yes.

Q But you don't recall if you did or not?

A I donot recall.

Q You recall seeing him there; is that correct?

A No, I recall seeing this man before, and I don't remember where, and he told me that he was Mr. Fish, and he had met me.

Q You had recognized him, but you didn't remember where you had seen him before?

A That's correct.

Q Is that correct?

A That's correct.

Q Were there other postal inspector with you at the time of Mr. Marshall's arrest in the United States Magistrate's Courtroom?

A Yes, there were.

Q And who were they?

A I would -- I have to guess at this. Inspector Nehil --

Q O'Neill?

A No, Nehil, N-E-H-I-L.

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1 DUQUETTE-cross

2 Q Is that the same mane as you mentioned before, or
3 is it a different man?

4 A No, before it was O'Neill.

5 Q And this is Inspector Nehil?

6 A Nehil, N-E-H-I-L, was one of them; possibly
7 Inspector O'Neill.

8 Q Anyone else?

9 A We have special investigators, I'm sure that they
10 were there. We keep no records as to who goes to the court.
11 The only record kept is the man who signs the complaint.

12 Q And that was you' is that correct?

13 A In this case, yes.

14 Q Is Mr. -- Inspector O'Neill is in the New York
15 area; that's correct, and he's still employed?

16 A He's in Queens.

17 Q Is he still employed by the service; is that
18 correct?

19 A Yes, he is.

20 Q And how about INSpector Nehil, is he still em-
21 ployed by the postal service; is that correct?

22 A Yes, he is.

23 Q so, it would be possible that both of these men
24 may have some knowledge of what occurred at the Magistrate's
25 Courtroom on that day?

1 DUQUETTE-cross

2 A Possibly, yes.

3 Q Do you recall a conversation with Mr. Fish, in
4 which you stated to Mr. Fish that it would be to Mr. Marshall's
5 best interest to execute a resignation immediately in the
6 courtroom?

7 A No, I don't recall.

8 Q You don't recall a conversation one way or another;
9 is that correct?

10 A That's correct.

11 Q But you do recall it's entirely possible you could
12 have discussed resignation with Mr. Marshall in your office
13 before he was brought to the courtroom?

14 A Yes.

15 Q Did you ever advise Mr. Marshall that he had the
16 right to discuss his job with a union representative?

17 A No, I did not.

18 Q Were you aware at the time that union representa-
19 tives -- one of their rights was their ability to discuss
20 jobs with the postal employees.

21 A No, I was not aware he had that right, at that
22 time.

23 Q But you knew he must have belonged to the postal
24 union; is that correct?

25 A I assume most postal employees belong to the union.

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1 DUQUETTE-cross

2 and it doesn't look any different.

3 Q Do you recall dictating to Mr. Marshall the
4 language in the resignation?

5 A NO, I don't.

6 Q Do you recall one way or another if you dictated
7 the words of the resignation to Mr. Marshall?

8 A No, sir, I don't.

9 Q Had you in the past ever dictated the terms --
10 the words of a resignation to a postal employee?

11 A Not dictated, but assisted as requested.

12 Q Assisted, giving him the wording? You have in the
13 past; is that correct?

14 A If requested, yes.

15 Q And you may have in this case; is that right?

16 A Possibly.

17 Q Mr. Duquette, in the work that you've been doing
18 in the past twelve years, you have to keep a record of the
19 number of people that you arrest; is that correct?

20 A That's correct.

21 Q You keep some records, right?

22 A If we have cases, yes.

23 Q And you also keep a record of what happens to
24 those that are arrested; isn't that right?

25 MR. STOKES: I object to this question. We're

1 DUQUETTE-cross

2 accused of crimes? In one way or another?

3 A I don't care for your wording, getting rid of.
4 I can answer this way, that when an employee is arrested
5 for the theft of mail, an attempt to get him out of the
6 postal service is made, either by charges or resignation.

7 Q I see, so one way or another, it's part of your
8 procedure to try to get him out of the service; is that
9 correct, before his criminal charges have been adjudicated;
10 is that correct?

11 A I would say yes.

12 Q And so in line of this procedure, in trying to
13 get these people out of the postal service, immediately
14 after they're accused of a crime, one of the things that
15 you attempt to do is to explain the resignation or the
16 reporting of their actions to the Postmaster; is that
17 correct?

18 A That is incorrect. If an employee requests in-
19 formation, "What happens to my job?" as I previously stated,
20 then the alternatives are explained to him.

21 Q Had you ever -- do you ever remember having a
22 conversation with any lawyer or representative of, or the
23 defendant directly at the time that he is accused, indicat-
24 ing to this, to the defendant or his representative that
25 if he didn't resign, he could lose his job and lose certain

1 DUQUETTE-cross

2 rights that he had under his job?

3 A The employee does not lose any rights whatsoever,
4 and I've never told an employee that; no.

5 Q Or his representative?

6 A That's correct.

7 Q Or that he was -- or he would be best off in
8 resigning; have you ever told an employee that?

9 A I might hae, yes.

10 Q In the past?

11 A That's correct.

12 Q You don't any more, but you might have in the
13 past?

14 A That's correct.

15 Q And you may very well have in this case; is this
16 correct? Or Mr. Fish? You don't recall?

17 A I don't recall, it's possible.

18 Q It's possible.

19 A It's possible, correct.

20 Q YOU may have told him that he was best off; is
21 that right?

22 A That's possible, yes.

23 Q Do you ever remember a conversation with the de-
24 fendant and the accused or his representative, the lawyer,
25 or whoever, that even if he's acquitted, he couldn't get

1 his job back?

2 A No, I don't recall that.

3 Q Could it have happened? Could you have had such
4 a conversation?

5 A I don't recall that ever coming up in any con-
6 versation with any postal employee?

7 Q Or an attorney?

8 A Or an attorney.

9 Q Mr. Duquette, to what advantage would it have
10 been to Mr. Marshall to have resigned at that time?

11 A What advantage?

12 Q Yes.

13 A None that I could see.

14 Q Do you ever recall indicating to an accused
15 postal worker that there would be no advantage in resign-
16 ing?

17 A Did I ever mention to a postal employee that it
18 would be no advantage to resigning? No.

19 Q Do you ever remember mentioning to a postal
20 employee that it would be an advantage to resign?

21 A No.

22 Q Was there any postal management representative
23 with you in the office when you discussed the -- in your
24 office when you discussed Mr. Marshall's case?

25 A No.

1 DUQUETTE-cross

2 A Well, I'm aware the effect of a resignation is
3 that you're no longer working --

4 Q Right, but --

5 A Is that what --

6 Q As far as the Civil Service is concerned, were you
7 aware of any of these effects?

8 A No, I'm not.

9 Q And you were not aware of them at the time, either;
10 is that correct?

11 A That's correct.

12 Q It's not your -- it was not your area; is that
13 correct?

14 A That's correct.

15 Q But it is true that at the time that it was your
16 general procedure to attempt to get those employees that
17 are accused of crimes out of the postal service?

18 A That's correct.

19 Q One way or another.

20 A Not through the employee --

21 Q No, but one way or another to get them out of the
22 postal service?

23 A That's correct.

24 Q After they're accused of a crime; is that correct?

25 A That's correct.

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1 that the inspectors were always supposed to operate
2 under, and they were never supposed to solicit resig-
3 nations from anybody.

4 MR. STOKES: Is your lawyer and you aware
5 of, Mr. Leventhal, that the policy whereby the union
6 representation can be had while the inspectors are
7 around only came in with the 1973 agreement. This
8 case of Mr. Marshall was prior to 1973, just making
9 a note of this.

10 MR. LEVENTHAL: Well, let me just clear that
11 up. First of all, there's nothing in that agreement
12 that refers to it. If you search the entire agree-
13 ment.

14 What the memorandum of understandin did
15 was to focus a situation, because the constitutional
16 rights under the Miranda case only says you're allowed
17 a legal representative, and because of that, inspectors
18 were not allowing shop stewards or union representa-
19 tives, upon the request of the employee to represent
20 the employee, and they recognized that the employee
21 is under duress, under emotional strain in these type
22 of cases, and he should be allowed a representative.

23 And the representative wouldn't get into
24 the criminal aspect of it, but he'd get into the
25 situations such as Mr. Marshall got into in advising

1 the employee of his rights and that it's not to his
2 benefit to resign.

3 And that's why it was just focussed in the
4 memo of understanding, but this was always the case,
5 and there's another section: if it only involved an
6 administrative interview, and that still holds true
7 today, where an inspector was going to question an
8 employee about some mail that was missing, and he
9 wasn't charging the employee, during that interview,
10 the employee is not allowed a representative. This
11 is just an administrative interview.

12 But they were always allowed representation.
13 It's just that it was spelled out in a memo of under-
14 standing to make it clear.

15 There's now a memorandum of understanding
16 that it is allowed, but before, employees were ques-
17 tioned without union representation --

18 MR. LEVENTHALL: Which was improper.

19 MR. STOKES: I just want this note to be
20 made in Mr. Marshall's case. All right.

21 MS. RING: Okay, if that concludes the
22 business of this hearing, I'll declare it closed at
23 this time.
24
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